U.S. Department of Labor

Board of Alien Labor Certification Appeals
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DATE: **September 28, 2000**

CASE NO.: **2000-INA-114**
CO NO.: **P1998-NY-02365166**

In the Matter of:

CHARLES SWARNS
Employer,

on behalf of

VERONICA O. ERIBO
Alien

Certifying Officer: Dolores DeHaan
New York, New York

Appearance: Inda Pal, Esq.
Brooklyn, New York
For Employer

Before: Vittone, Burke and Wood
Administrative Law Judges

DECISION AND ORDER

Per Curiam. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Household Cook.[1] The CO denied the application and Employer requested review pursuant to 20 C.F.R.

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[1] Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

§656.26.

STATEMENT OF THE CASE

On March 27, 1997, Employer, Charles Swarns ("Employer"), filed an application for labor certification on behalf of the Alien, Veronica O. Eribo, ("Alien"), to fill the position of "Cook/household/live-out." (AF 8). The job duties for the position in question were described by Employer as follows:

> Plan menus, prepare and cook African speciality dishes of poultry, fish, beef, goat and seafoods, soup and soul food. Bake bread and pastries roll. Order food stuff, clean kitchen and utensils. Serve meals. Prepare special dishes for special occasions.

Two years of experience in the job offered were required.

In a letter to the Department of Labor, Employer explained that the need for a household cook arose as a matter of necessity. (AF 6). Employer pointed out that his mother suffers from an acute form of dementia and some form of help was needed with the chores, and that the cook would be able to give the much-needed oversight to his mother while the family was away at work.

The CO issued a Notice of Findings ("NOF") on June 24, 1999, proposing to deny certification, based on her finding, *inter alia*, that (1) the job opportunity included an unduly restrictive job requirement; and (2) the application contained insufficient information to determine whether the position of Domestic Cook was a bona fide job opportunity in Employer's household. (AF 17). In her NOF, the CO advised Employer that under General Administration Letter ("GAL") No. 1-97, the New York State Employment Office ("State Office") was instructed not to authorize recruitment on applications which may contain restrictive requirements. If an employer refused to remove the restrictive requirements, as the instant Employer had done, the State Office was instructed to send the application on for a determination as to whether the application contained restrictive requirements. However, pursuant to a settlement agreement reached in Lauretta v. Herman, No. 98-56061 (9th Cir., March 5, 1999), GAL No. 1-97 had recently been amended by GAL No. 1-97, Change 1, primarily in that the procedure of having unduly restrictive requirements adjudicated prior to allowing advertising of the job opportunity had been removed.

Given that Employer's application was caught in the transition between procedures, Employer was given the opportunity to choose between (1) submitting a rebuttal to the determination of the NOF; or (2) having the application remanded to the State Office to allow him to recruit against the job requirements stated in his application. In either event, Employer was advised to submit his response on or before July 29, 1999. If his rebuttal was accepted, his application would be forwarded to the State

Office for recruitment. If he chose the second option, his application would again be reviewed and an NOF reissued.

The NOF directed Employer to explain why the position of Domestic Cook in his household should be considered a bona fide job opportunity rather than a job opportunity that was created solely for the purpose of qualifying the alien as a "skilled worker."[2] Employer was directed to provide responses to questions dealing with the number of meals prepared per day and week, the number of people being fed and the length of time required to prepare these meals; the work and/or school schedules of all persons residing in the household; the frequency with which the family entertained; who cared for pre-school or school-aged children when both parents were absent from the home or when the alien was preparing meals or had time off; whether the alien had duties other than cooking, and if not, who performed those non-cooking functions in the household; whether there were any special dietary circumstances of the household, and if so a physician's statement was required; what percentage of Employer's disposable income would be devoted to paying the alien's salary, Employer being directed to provide a copy of his Federal income tax return for the immediately preceding calendar year; whether any other domestic workers were employed in the household; whether the household has ever before employed a Domestic Cook; what the alien's duties were when initially hired and the wages paid; what the alien's training and experience as a cook was, and to what extent that training and experience involved cooking in a domestic situation; how the alien learned of the job offer; and the nature of the relationship between Alien and Employer. Employer was advised that the adequacy of his documentation would be key to evaluating his application because little weight would be accorded to conclusory statements.

The CO also found, pursuant to 20 C.F.R. §656.21(b)(2), that the job as advertised contained the unduly restrictive requirement that the applicant have specialized experience in preparing African style food. The Dictionary of Occupational Titles ("DOT") does not list particular ethnic/religious foods as common to the job description of cook, and therefore such a requirement was deemed to be Employer's personal preference, and not a normal job requirement. Employer was directed to provide proof that the requirement arose out of business necessity. Alternatively, Employer could delete the requirement and re-advertise.

The CO further noted that Alien did not possess full-time experience as a Domestic Cook, African Style, although she did possess experience as a Houseworker General with cooking duties. Based upon Alien's prior experience, the CO found that the Employer was willing to accept less than two years of experience in the job offered, leading the CO to conclude that the Employer failed to

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[2]The Immigration Act of 1990 (IMMACT 1990) reduced the number of immigrant visas available to unskilled alien workers (aliens granted labor certification in occupations requiring less than two years of experience.) The visa waiting period for aliens in the unskilled category now exceeds five years, while visas for skilled alien workers (aliens granted labor certification in occupations requiring at least two years of experience) are currently available without a waiting period.

adequately document why it was not feasible for the employer to hire a U.S. worker with less training and/or experience. See 20 C.F.R. §656.21(b)(5). Alternatively, Employer could delete the requirement and amend the application.

By letter dated July 19, 1999, counsel for Employer indicated Employer's intent to reduce the two years of experience requirement to three months. (AF 33) Included with counsel's letter was a letter of even date submitted by Employer. (AF 32). In his letter, Employer detailed his work hours, his wife's work hours and the cook's work hours. He stated that the family entertained every week or every other week, that there were no school-aged or pre-school children in the household, and that he required a cook who could cook healthy African specialty dishes. Employer explained that there was an "elderly lady who resides in the household so she will need to be taken care of and has special dietary needs. Employer stated that approximately 20% of his income would be devoted to paying the alien's salary and that there were no other domestic workers in the household. Furthermore he had never before employed a Domestic Cook. With regard to Alien, Employer stated she had not yet been employed by him, but that she had two years of experience as a Home Attendant. An affidavit regarding her work experience was attached.

On September 1, 1999, the CO issued a Final Determination ("FD"), denying certification on the grounds that the Employer had failed to successfully rebut 20 C.F.R. §656.20(c)(8) and 20 C.F.R. §656.21(b)(2). (AF 36) The CO noted that while Employer addressed all the questions asked in the NOF, he failed to submit any of the requested supporting documentation to prove that a bona fide job opening for a Domestic Cook actually existed in his household. Specifically, the special dietary needs of the elderly lady residing in the household were not documented, nor were they supported by the letter of a physician. In addition, the CO noted that Employer had amended the ETA 750A form, Item 13, to include the duty of "car[ing] for a sick lady," which was not a customary job duty of a Domestic Cook. (AF 52). The CO also found that the Employer failed to address the issues raised pursuant to 20 C.F.R. §656.21(b)(5).

By letter dated September 28, 1999, Employer requested review of the FD. (AF 64).

DISCUSSION

Initially, it must be noted that Employer has attempted to submit additional evidence since the FD was issued. Section 656.26(b)(4) provides that the request for administrative-judicial review "shall contain only legal argument and only such evidence that was within the record upon which the denial of labor certification was based." This Board is strictly an appellate body; our decision must be based only on the record on which the CO reached a decision, and on arguments submitted in any brief or position statement by the parties. Evidence first submitted before the Board may not be considered. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). Therefore, the additional evidence submitted by Employer after the FD was issued shall not be considered herein. The evidence was clearly requested in the NOF and Employer failed to provide it. Furthermore, Employer never requested an

extension of time in which to submit additional documentation, and did not raise the issue until after the FD had been issued. Employer's failure to request an extension or give notice of the need for additional time renders a remand of this matter inappropriate. *Dr. & Mrs. Craig Fabrikant*, 1991-INA-305 (Dec. 20, 1993).

Section 656.20(c)(8) of the Department's labor certification regulations requires that the employer offer a *bona fide* job opportunity. Whether a job opportunity is *bona fide* is gauged by a "totality of the circumstances" test. *See Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (*en banc*), *cited in, Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*). .

The burden of proving that the employer is offering a bona fide job opportunity is on the employer. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988)(*en banc*). Thus, it is the employer's burden at rebuttal to perfect a record that is sufficient to establish that a certification should be allowed. In the instant case, Employer was advised of the specific documentation which was needed to rebut the NOF, including copies of his Federal income tax return for the prior year, an entertainment schedule and information regarding special dietary circumstances of the household. Employer was specifically advised that the adequacy of the documentation would be key, and that little weight would be accorded to conclusory statements. Employer, however, failed to submit any of the requested documentation.

Where the CO requests documentation or information which has a direct bearing on the resolution of the issue and is obtainable by reasonable effort, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*). An employer's failure to produce documentation reasonably requested by the CO will result in a denial of labor certification. *John Hancock Financial Services*, 1991-INA-131 (June 4, 1992); *Rocco Parente*, 1992-INA-248 (Aug. 2, 1993).

Employer's rebuttal consisted of bare assertions, and broad statements regarding the duties of the position at issue and how his household is run. He provided none of the documentation requested to support those assertions. His rebuttal, therefore, cannot carry his burden of proof. *See Neil Clark*, 1995-INA-92 (Jan. 27, 1997). Accordingly, we find that the CO's denial of labor certification was proper, given the Employer's failure to provide documentation that the position of Domestic Cook was a bona fide job opportunity in his household, and the following order shall enter:

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of panel:

Todd R. Smyth, Secretary to the Board
of Alien Labor Certification Appeals

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.